

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

In the Matter of

TOWN SQUARE TOWERS CONDOMINIUM, INC.

Employer

and

Case 5-RC-15248

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 99

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein call the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. Town Square Towers Condominium, Inc. (herein the Employer), a Washington, DC corporation, with a facility located at 700 7th St., SW, Washington, DC, is engaged in the business of operating a residential condominium. During the past twelve months, a representative period, the Employer has derived gross revenues in excess of \$500,000. As the Employer is located in Washington, D.C., it is appropriate to assert plenary jurisdiction. The parties stipulate, and I find, that the Employer is engaged in commerce within the meaning of the Act.

The parties stipulated, and I find, that the International Union of Operating Engineers, Local 99 (hereinafter “the Petitioner” or “the Union”) is a labor organization within the meaning of Section 2(5) of the Act.

The Petitioner filed a petition seeking to represent a unit of all part-time and full-time maintenance, chief engineer, engineers and desk attendants, but excluding security, janitorial, managers and all other workers as defined in the Act. There are eight employees in the petitioned-for unit. There is no history of collective bargaining between the parties for these employees.

The parties stipulated at the hearing that site manager Robin Johnson is a supervisor as defined by Section 2(11) of the Act, and that she has the authority to hire, fire, promote and demote employees. The parties further stipulated that assistant manager Barbara Barton is a confidential employee. Based on the parties’ stipulations and the record as a whole, Robin Johnson and Barbara Barton are excluded from the unit found appropriate herein.

ISSUES

- 1) Whether an appropriate unit is a wall-to-wall unit including all maintenance employees and front desk clerks; and
- 2) Whether lead engineer Robert Fullmer and front desk supervisor LaDosca Gunby are supervisors within the meaning of the Act.

POSITIONS OF THE PARTIES

The Petitioner contends at hearing and in brief that the petitioned-for unit is appropriate and should include all maintenance engineers, the chief engineer and desk attendants. The Petitioner asserts that the desk attendants should be included in the unit because of their interaction involving daily service work orders, emergency communications via radio, handling of paperwork and dealing with tenants. The Petitioner contends that lead engineer Robert Fullmer and front desk supervisor LaDosca Gunby are not supervisors and should be included in the unit.

The Employer contends that an appropriate unit should not include both maintenance/engineering employees and front desk employees. Instead, the Employer contends that there should be a 2-person unit of maintenance/engineering employees and a 4-person office/front desk unit. Furthermore, the Employer contends at hearing and in brief that lead engineer Fullmer and front desk supervisor Gunby are supervisors or agents and should be excluded from the unit.

THE EMPLOYER’S OPERATIONS

The Employer is in the business of operating a residential condominium building. The building contains eight floors, 285 units and houses just over 500 residents. The

only witness presented at the hearing was the Employer's site manager Johnson who has been employed by the Employer for approximately 3 years.

The front desk clerks and maintenance employees punch the same time clock, which is located next to the front desk. The maintenance employees have a pay range from \$9.77 to \$13.11 per hour, and the front desk clerks are paid between \$7.50 and \$8.00 per hour. Front desk supervisor Gunby punches the time clock and is paid approximately \$11.94 per hour. Lead engineer Fullmer is a salaried employee. All full-time employees are eligible for health insurance and life insurance. Both full-time and part-time employees are eligible for sick leave, bereavement leave and education benefits. Part-time employees are not eligible for holiday pay.

Maintenance employee Frank Borden works 8:30 a.m. to 5:30 p.m. and assistant engineer Thomas Davis works from 8:00 a.m. to 5:00 p.m. Lead engineer Fullmer works from 7:00 a.m. to 3:00 p.m. The maintenance employees rotate working an on-call schedule, which covers weekends and evening hours during the week. The maintenance employees receive two 15-minute breaks and a 30-minute lunch break during the workday. There is no lunchroom, but there is an area provided for maintenance employees to eat lunch.

There are three full-time front desk clerks and two part-time front desk clerks. Gunby works from 7:00 a.m. to 3:00 p.m., Monday through Friday, and is not present when the other desk clerks are working. Front desk clerk Montez works 3:00 p.m. to 11:00 p.m., Tuesday through Friday; Holmes works 3:00 p.m. to 11:00 p.m. on Monday, 11:00 p.m. to 7:00 a.m. on Tuesday and Wednesday, and 7:00 a.m. to 3:00 p.m. on Saturday and Sunday; Brown works 11:00 p.m. to 7:00 a.m. on Monday, Thursday, Friday, Saturday and Sunday; and Miller works 3:00 p.m. to 11:00 p.m. on Saturday and Sunday. The front desk clerks take their breaks and lunch break at the receptionist desk.

Front desk clerks are responsible for answering telephones, logging packages and incoming mail, making copies, taking messages, logging parking passes and checking the parking area for vehicles in the rear of the building. Front desk clerks, including front desk supervisor Gunby, do not use a computer or any other tools. There are no qualifications or educational requirement for front desk clerks other than experience answering telephones and working at a front desk. Maintenance employees are responsible for completing work orders in resident's units, in the building and the surrounding property. The maintenance employees maintain a logbook of work that has been done.

Johnson testified that Fullmer is responsible for assigning tasks to maintenance employees, prioritizing and monitoring their work, and ensuring work that is done in a timely manner. Fullmer must hold certain licenses as a requirement of his position. He is responsible for maintaining the boiler room, the chillers, the swimming pool, sauna and exercise room. Fullmer is also responsible for ensuring that construction or other contractors who perform work on the property do so in a satisfactory manner. Fullmer spends approximately 50 to 60 percent of his time working with tools. Fullmer has held the position of lead engineer since May 2001 and has not had any cause to discipline or

terminate employees. Employee evaluations are performed annually each September; in this regard, Fullmer has not been employed during an evaluation period. The record evidence discloses that other employees who have held the lead engineer position have issued verbal and written warnings to maintenance employees and prepared performance evaluations.

Johnson testified that Gunby is responsible for assigning duties, monitoring employees and setting schedules. Front desk clerks submit all leave requests to Gunby, who then approves or denies the request. The record evidence demonstrates that Gunby has prepared performance evaluations, issued written warnings to employees and effectively recommended the termination of front desk employees. Although Johnson terminated the employee, she testified that she did not conduct any further investigation into the circumstances and relied on the recommendation of Gunby that the employee be terminated.

CONCLUSIONS

UNIT SCOPE

Section 9(b) of the Act states the Board “shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof....” The statute does not require that a unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Rather, the Act only requires that the unit be “appropriate.” *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Parsons Investment Co.*, 152 NLRB 192, fn. 1; *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enf’d. 190 F.2d 576 (7th Cir. 1951). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless “an appropriate unit compatible with that requested does not exist.” *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger’s Paramus*, 151 NLRB 748, 751 (1965); *Purity Food Stores, Inc.*, 160 NLRB 651 (1966). It is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-3 (4th Cir. 1962), cert. Denied 375 U.S. 966 (1964); *Mountain Telephone Co. v. NLRB*, 310 F. 2d 478, 480 (10th Cir. 1962).

In *Airco, Inc.*, 273 NLRB 348, 349 (1984), citing *Kalamazoo Paper Box Corp.*, 136 NLRB at 136, the Board found that a petitioned-for “plant-wide unit is presumptively appropriate under the Act, and a community of interest inherently exists among such employees.” When a plant-wide unit is sought by the Petitioner, the burden of proving that the interests of a particular classification are so disparate from those of other employees that they cannot be represented in the same unit rests with the party challenging the unit’s appropriateness. *Livingstone College*, 290 NLRB 304, 305 (1988); *Airco, Inc.*, 273 NLRB at 349.

In determining the community of interest of employees in a unit, the Board will consider skills, duties, working conditions, the Employer’s organization, supervision, and

bargaining history, but no one factor has controlling weight. *Airco, Inc.*, 273 NLRB 348 (1984); *E.H. Koester Bakery Co.*, 136 NLRB 1006, 1009-11 (1962); *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 136-38 (1962). Based on the record evidence, I find that a sufficient community of interest exists between the maintenance employees and the front desk clerks to warrant finding an overall unit appropriate. Furthermore, I find that the presumption that the petitioned-for, wall-to-wall unit is appropriate has not been rebutted.

SUPERVISORY ISSUES

Section 2(11) of the Act, 29 U.S.C. Section 152, provides:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive; the possession of any one of the authorities listed is sufficient to place an individual invested with this authority in the supervisory class. *Mississippi Power Co.*, 328 NLRB 965, 969 (1999), citing *Ohio Power v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). Applying Section 2(11) to the duties and responsibilities of any given person requires the Board to determine whether the person in question possesses any of the authorities listed in Section 2(11), uses independent judgment in conjunction with those authorities, and does so in the interest of management and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). Thus, the exercise of a Section 2(11) authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677 (1985). As pointed-out in *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cited in *Hydro Conduit Corp.*: "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." See also *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992). In this regard, employees who are mere conduits for relaying information between management and other employees are not statutory supervisors. *Bowne of Houston*, 280 NLRB 1222, 1224 (1986).

The party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is ineligible to vote. *Kentucky River Community Care, Inc.*, __ U.S. __ (2001). Conclusory evidence, "without specific explanation that the [disputed person or classification] in fact exercised independent judgment," does not establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Similarly, it is an individual's duties and responsibilities that determine his or her status as a supervisor under the Act, not his or her job title. *New Fern Restorium Co.*, 175 NLRB 871 (1969).

The record evidence supports a finding that lead engineer Fullmer and front desk supervisor Gunby are supervisors within the meaning of Section 2(11) of the Act warranting their exclusion from the bargaining unit. The record evidence clearly demonstrates that Gunby has issued discipline to front desk clerks and effectively recommended termination. Despite the fact that lead engineer Fullmer has held his position for only a few months and not yet exercised his supervisory authority, the record evidence establishes that other individuals who have held the position of lead engineer have issued discipline to employees. The Petitioner has failed to present any evidence to rebut the record evidence that Gunby and Fullmer are supervisors within the meaning of the Act. Therefore, I find that front desk supervisor Gunby and lead engineer Fullmer are supervisors and exclude them from the unit.

CONCLUSION AS TO THE UNIT

Based on the foregoing, the record as a whole and careful consideration of the arguments of the parties at hearing and in brief, I find the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining:

All full-time and regular part-time maintenance employees and front desk employees employed by the Employer at its Washington, DC location, but excluding the lead engineer, front desk supervisor, confidential employee, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An Election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 99**.

LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by, **AUGUST 29, 2001**.

Dated: August 15, 2001
At Baltimore, Maryland

/s/STEVEN L. SHUSTER
Acting Regional Director, Region 5

